

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of the Denial of an Outdoor Advertising Device Permit to Midwest Outdoor Advertising, Inc., of 1103 Homer Street, St. Paul, MN 55116-3231 for an Advertising Device to be Located in the City of St. Paul Along I-35E North of Cayuga Street.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Allen E. Giles on March 25, 1997, at 9:30 a.m. at the Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota. The record in this matter closed on April 21, 1997 with the receipt of the final reply brief.

John C. Jeppesen, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of the Minnesota Department of Transportation ("Department" or "DOT"). Thomas R. Haugrud, Rosene, Haugrud & Staub, Chartered, Suite 1250 Capital Centre, 366 North Wabasha Street, St. Paul, Minnesota 55102-1300, appeared on behalf of Midwest Outdoor Advertising, Inc. (Hereinafter also referred to as "Midwest Outdoor" or "Midwest").

This report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Parties should contact James N. Denn, Commissioner of Transportation, 411 Transportation Building, 395 John Ireland Boulevard, St. Paul, Minnesota 55155; telephone 612/297-2930, for information on filing exceptions and presenting argument.

STATEMENT OF ISSUES

Whether the Minnesota Department of Transportation's denial of an outdoor advertising device permit to Midwest Outdoor Advertising, Inc., for a location in St. Paul, Minnesota along Interstate Highway 35E north of Cayuga Street was an appropriate exercise of the Department's authority and consistent with Minn. Stat. § 173.13 and Minn. Rules pt. 8810.1300.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On or about July 15, 1996, 3M National Advertising (3M) filed an application with the Minnesota Department of Transportation for a billboard permit for a site located in the City of St. Paul, Minnesota along the west side of I-35E, 910 feet north of Cayuga Ave. The DOT issued Permit No. 3192 to 3M on July 17, 1996. The Permit was issued subject to 2 conditions: (a) The billboard had to be constructed within 120 days; and (b) the Permit was issued contingent on 3M "meeting any and all requirements of the City of St. Paul and or the County of Ramsey". Exhibit 2.

2 3M did not obtain a permit from the City of St. Paul. St. Paul's local zoning ordinance requires that billboards such as the kind proposed in this proceeding be located no less than 1000 ft from another billboard. The 120-day construction window on Permit No. 3192 issued to 3M expired on November 13, 1996.

3. On October 15, 1996, DOT received an application from Midwest Outdoor for a billboard to be located within approximately 100 feet of the site of the 3M Permit No. 3192. The Midwest Outdoor application was accompanied by a City of St. Paul permit. See Exhibit 4. Midwest Outdoor's application was received by DOT within the 120-day construction window of Permit No. 3192. The Midwest Outdoor application evidenced by Exhibit 4 was denied by DOT by letter dated October 16, 1996, because it was within 500 feet of the location where the 3M sign was proposed to be built.. See Exhibit 5.

4. Believing that DOT was in error, Midwest Outdoor resubmitted its application by letter dated October 17, 1996, received by DOT October 18, 1996. See Exhibit 6. That was again denied by Mr. Michael Constant, Metro Division Advertising Control Agent on behalf of DOT by note dated October 22, 1996. See Exhibit 7. The Midwest Outdoor application was again submitted to DOT by letter dated October 24, 1996, received October 25, 1996. See Exhibit 8. The letter evidenced in Exhibit 8 also included a letter from the City of St. Paul, stating that 3M's permit application could not be approved at this time. By letter dated November 12, 1996, Midwest Outdoor made a written inquiry regarding the resubmitted application. See Exhibit 9.

5. 3M did not construct the sign within the 120-day construction window of Permit No. 3192. DOT received a new application from 3M for this site on November 5, 1996. See Exhibit 3. On that same day, Permit No. 3201 was issued to 3M. The 120-day construction window on Permit No. 3201 expired on March 4, 1997.

6. Midwest Outdoor submitted a new application dated December 13, 1996 for the site, which was hand-delivered, and received by DOT on December 13, 1996. See Exhibit 10. By letter dated December 13, 1996, the new application was denied by DOT, again because it is within 500 feet of the 3M site.

7. 3M did not construct the sign within the 120-day construction window of Permit No. 3201. 3M again applied for the site by application received on February 17 or 18, 1997. 3M was issued Permit No. 3209, and the 120-day construction window expires on June 13, 1997. See Exhibit 13.

8. 3M still has not received a permit from the City of St. Paul. 3M still has not commenced any construction on the site. Mr. Constant indicated that the Department will continue to indefinitely issue new permits to 3M if it applies for a new permit within the 120-day construction window, even if 3M never receives a city permit, and even if 3M never commences construction.

9. The City of St. Paul's ordinance on the distance that billboards must be separated is more restrictive than the State's. St. Paul's ordinance requires that billboards be separated by no less than 1000 feet. The reason that 3M cannot be issued a permit from the City of St. Paul is that its proposed billboard construction is within 1000 feet of the Midwest Outdoor permit authority.

10. The Department has allowed renewals of permits for construction of advertising devices since the rules on advertising devices were adopted in 1971

11. On December 20, 1997, Midwest requested an administrative hearing on the denial of the permits. Pursuant to Midwest's request for a hearing, a Notice of Hearing was issued on February 21, 1997, setting the hearing for March 25, 1997.

12. The City of St. Paul has not obtained certification from the Commissioner of Transportation to become the sole permitting authority for issuance of outdoor advertising device permits within its boundaries.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Transportation have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 173.13.

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of law and rule have been fulfilled.

3. Any of the foregoing Findings properly considered Conclusions of Law are hereby adopted as such.

4. Pursuant to Minn. Rule 1400.7300, subp. 5, the applicant, Midwest Outdoor Advertising, Inc., has the burden of establishing that the Department's denial of its permit application was not appropriate.

5. Minn. Stat. Chapter 173 authorizes state and local sign authorities to issue or deny advertising device permits.

6. Under Minn. Stat. § 173.16, subd. 4, advertising devices can be situated no closer than 500 feet from each other on the same side of the interstate highway in the area at issue.

7. Because the distance between the proposed 3M site and the proposed Midwest site is closer than 500 feet, granting both 3M's and Midwest's applications for a permit would violate Minn. Stat. § 173.16, subd. 4.

8. Pursuant to Minn. Rule 8810.1300, subp. 5, a permit is void if the billboard is not erected within 120 days of the issuance of the permit and, where a permit is voided, a new application must be filed to obtain a permit. Minn. Rule 8810.1300, subp. 5 provides as follows:

Subpart 5. Void permits. All permits issued for erection of a new advertising device are null and void if the erection of the device is not completed within 120 calendar days after the permit has been issued. If a permit is voided because of no erection, there will be no refund of monies and a new application and process shall be initiated.

9. 3M's Permit No. 3192 for construction of a billboard became null and void on November 13, 1996, 120 days after issuance of the permit. The Department has no implied authority to renew a permit that is null and void after the passage of 120 days. The Department's renewal of Permit No. 3192 is unauthorized by law and contrary to Minn. Rule 8810.1300, subp. 5. Renewing billboard permits for an indefinite period to accommodate construction is contrary to Minn. Rule 8810.1300, subp. 10.

10. Minn. Rule 8810.1300, subp. 1, requires that applications for permits be processed in order of receipt. Because Midwest's application for a permit was filed on October 15, 1996 before 3M's application which was filed on November 5, 1996, Midwest's application should have been processed first.

11. Because the Parties do not dispute that Midwest Outdoor's application satisfied the requirements for issuance of a construction permit, Midwest Outdoor should have been issued a permit.

12. Based on the foregoing, the Department's issuance of a renewal permit to 3M is an improper exercise of its authority and the denial of the application of Midwest Outdoor Advertising, Inc. for a sign permit is contrary to law.

13. Pursuant to Minn. Stat. § 173.16, subd. 5(1), local zoning authorities may become the sole authority for issuance of advertising device permits within their local government boundaries. The provision provides as follows:

Whenever a bona fide county or local zoning authority has made a legitimate determination of customary usage and in the judgment of the commissioner, reasonably provides for size, lighting and spacing control of advertising devices, such determinations shall be accepted in lieu of the provisions of this chapter in the zoned commercial and industrial areas within the geographical jurisdiction of such authority.

14. Minn. Rule 8810.1400 requires that a local zoning authority obtain certification from the Commissioner of Transportation before it can obtain sole jurisdiction to issue outdoor advertising device permits. Because the Commissioner of Transportation has not certified the ordinance and zoning practice of the City of St. Paul, billboard permits issued by the City of St. Paul do not qualify as "acceptable in lieu of the provisions" of Minnesota Statutes Chapter, 173.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the practice of renewing billboard permits that are required to become null and void after a passage of time be discontinued and that the permit application of Midwest Outdoor be granted.

Dated this ____ day of June, 1997.

ALLEN E. GILES
Administrative Law Judge

Reported: Taped (2 tapes).

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Authority to Renew a Void Permit

- The facts of this matter are not disputed. 3M obtained state Permit No. 3192 to erect and maintain an advertising device. Permit No. 3192 contains two conditions: a) that the sign must be erected within 120 days or the permit is void, and b) that 3M obtain a permit from the City of St. Paul. 3M did not obtain a city permit to erect an outdoor advertising device and the billboard was not erected within 120 days. Midwest requested a permit for an outdoor advertising device at a location within 500 feet of the 3M site. Midwest's first application was filed before the 120-day period on 3M's state permit expired. Upon being informed that its application was being denied, Midwest twice resubmitted its application. The second reapplication by Midwest was held by the Department in the event that anything material changed regarding the application. 3M filed a request to renew its permit eight days before that permit became null and void. The Department renewed the permit for 3M and again denied Midwest's application.

The Department has issued 3 permits -- Permit Nos. 3192, 3201 and 3209 -- to 3M for erection of the billboard. Each of these permits had the same conditions-- 120-day construction window and permit authority from the City of St. Paul.

Midwest asserts that 3M's failure to put up a sign in the 120-day permit period renders the permit void. Subpart 5 states that "If a permit is voided because of no erection there will be no refunds of moneys and a new application and process shall be initiated." Were a new permitting process to be initiated, Midwest would be entitled to a permit, since Midwest's application would be the first received and there would be no competing site within 500 feet for which a state permit was issued.

The Department's rules on issuing, processing and voiding permits, Minn. Rules pt. 8810.1300, control the result in this case. The applicable rule is clear and unambiguous. Minn. Rule pt. 8810.1300 provides in relevant part as follows:

Subpart 1. Permit applications. Applications for permits may be obtained at any district office or central office of the Minnesota Department of Transportation. However, for the purpose of processing and approval, permit applications will be filed at or forwarded to the Department's district office having jurisdiction over the area in which the advertising device is located.

The application for permit shall be filled out in its entirety and all applications will be processed in order of receipt. If an application has to be returned for any additional information required to properly evaluate the application, it will not retain its preference over any other application that may be pending for the same area.

* * *

Subpart 4. Expiration and renewal. Requests for permit renewals will not be accepted more than 60 calendar days prior to the expiration date of the permit. All permits within scenic areas will expire on December 31 of each year. All permits for signs in non-scenic areas will expire on June 30 of every year.

Subpart 5. Void permits. All permits issued for erection of a new advertising device are null and void if the erection of the device is not completed within 120 calendar days after the permit has been issued. If a permit is voided because of no erection, there will be no refunds of monies and a new application and process shall be initiated.

* * *

Subpart 10. Nonrenewal. For the purpose of Minnesota Statutes section 173.13, an advertising device for which a permit can be issued shall when erected be a complete billboard, sign, notice, poster, or display intended to advertise a product or legend. An advertising device which is painted out, or painted over, or advertising space for lease and which has so existed for one permit period shall not be considered for a permit or renewal. Where there are posts only, partial structure, company name markers, or no structure at all, a renewal shall not be issued.

* * *

Based upon subpart 5 above, 3M's Permit No. 3192 (3M's first permit) to construct a billboard became null and void after the passage of 120 days. The Department, however, argues that the 3M permit did not become null and void because 3M applied for a new permit within the 120-day window for construction. The Department asserts that it has the authority to "renew" a permit scheduled to become null and void by operation of law after passage of time. The Department admits that there is no specific authority in Minnesota Statutes chapter 173 or the subject rules that empowers the Department to allow such "renewals". The Department states in its Brief, however:

While neither the Act nor subpart 5 of the regulations specifically provide that the 120-day advertising device erection permit can be renewed and extended, neither the act nor the regulations provide that renewal and extension cannot be granted.

The Department bases its implied authority to renew the permit on subpart 4 above. The Department reasons that subpart 4 recognizes that permits can be renewed and subpart 4 "clearly recognizes that it is appropriate to grant permit renewals and to do so before a permit has expired". The Department continues by stating that subpart 4 does not distinguish between permits issued for erection of advertising devices and permits dealing with advertising devices that are erected and in place. The Department asserts that because of the ambiguity in subpart 4 deference should be given to the long-standing practice of the Department to renew 120-day construction permits.

The Judge is unpersuaded by the Department's assessment of its implied authority to renew permits scheduled to become null and void. First, the Judge agrees with Midwest's argument that "the rules specifically state that an expired permit can be renewed, Minn. Rule 8810.1300, subpart 4, and that a void permit requires a new application and process, Minn. Rule 8810.1300, subpart 5 (emphasis in original). The Judge believes that the applicable subparts of Minn. Rule 8810.1300 are clear and unambiguous. The Department may not impose its own interpretation upon the rule. Phelps v. Commonwealth Land Title, Inc. Co., 537 N.W.2d 271, 274 (Minn. 1995). In construing administrative rules, courts employ rules of statutory construction. See Carl Bolander & Sons Co. v. City of Minneapolis, 488 N.W.2d 804, 808 (Minn. Ct. App. 1992). The plain language of a statute should not be disregarded and nothing should be read into it if the meaning is clear. Kirkwold Constr. Co. v. M.G.A. Constr. Inc., 513 N.W.2d 241, 244 (Minn. 1994).

There is no ambiguity in the applicable rules. The "ambiguity" arises as a result of the Department's explanation and justification for its actions, not because of the language in the Rules. It is inappropriate for the Department to impose an interpretation on unambiguous rules.

Moreover, the Department's assertion of ambiguity -- that "neither the act nor the regulations provide that renewal and extension cannot be granted"-- is called into question by Subpart 10 above. This provision addresses instances where a renewal would not be allowed. Under this Subpart if a permitted billboard is not erected and maintained after a permit period, the Department is specifically prohibited from renewing the permit. Thus there are circumstances where the Department is directed not to renew a permit. Coincidentally, it should be noted that a circumstance where permit renewal is prohibited is where a permittee has failed to erect a completed billboard.

Finally, the Minnesota Supreme Court has directed that State Agencies carefully enlarge their authority by implication and that "any enlargement of express powers by implication must be fairly drawn and fairly evident from . . . powers expressly given by the legislature". Minnegasco v. Minnesota Public Utilities Commission, 549 N.W.2d 904, 907 (Minn. 1996), quoting from Peoples Natural Gas Co. v. Minnesota Public Utilities Commission, 369 N.W.2d, 530, 534 (Minn. 1985). The Department has made no effort to align its "implied" authority with express authority granted by the Legislature.

The Department has presented this case as challenging its authority to renew permits scheduled to become void. Because the permits issued to 3M (after the first permit) are new permits, they are not “renewals”. The question is not whether the Department has the authority to renew a permit scheduled to become void, rather, the question is may the Department give preference to permittees when it processes a new application. The latter question is not an issue in this proceeding; it has not been presented or argued by the parties.

Although not factually presented or argued in this case, the Judge would be sympathetic to the Department’s desire to be flexible and generous to permittees who are having difficulty arranging construction. There are other more reasonable ways to deal with this problem. The Department could require permittees to file a request to vary the Department’s application processing rules if construction is not completed within the 120-day construction period. The Department may consider a change in its rules. Persons who are closer to the construction problems that permittees face may have some other suggestions as to how to address this problem. There are a number of alternatives the Department might consider instead of simply claiming to have implied authority to renew a permit to be voided by passage of time.

Deference to a Local Zoning Authority

Midwest has maintained throughout its application and appeal that the issuance of a city permit should take precedence over the state permit process. In support of the this argument, Midwest cites Minn. Stat. § 173.16, subd. 5 which states:

Local control. (1) Whenever a bona fide county or local zoning authority has made a legitimate determination of customary usage and in the judgment of the commissioner, reasonably provides for size, lighting and spacing control of advertising devices, such determination shall be accepted in lieu of the provisions of this chapter in the zoned commercial and industrial areas within the geographical jurisdiction of such authority.

(2) All county and local zoning authorities shall give notice to the commissioner of transportation of the establishment or revision of any commercial and industrial zones pursuant to subdivision 1. Notice shall be by certified mail sent to the office of the commissioner of transportation in St. Paul, Minnesota, within 15 days after the effective date of the zoning change or establishment.

(3) The commissioner may not disapprove any zoning ordinance adopted by a county or local zoning authority that has the effect of establishing a business area unless the zoning ordinance would result in the loss to the state of federal highway funds.

The Department does not dispute that the City of St. Paul has legitimate zoning authority that is exercised in making decisions regarding construction issues in general and regarding outdoor advertising devices in particular. The Department does maintain, however, that the City of St. Paul has not gone through the process established under Minn. Rule 8810.1400 for that zoning authority to be certified as a “bona fide zoning authority” for the purposes of Minn. Stat. § 173.16, subd. 5. The rule part requires any zoning authority seeking certification to submit all information pertinent to the manner in which the authority carries out its zoning function to allow the Commissioner of Transportation to determine whether certification should be granted.

Midwest asserts that the existence of the legitimate zoning authority in St. Paul is all that Minn. Stat. § 173.16, subd. 5, requires to give the city permit precedence over any state requirement. This argument overlooks the statutory provision that the Commissioner of Transportation exercise judgment as to whether the zoning authority “reasonably provides for size, lighting, and spacing control of advertising devices.” Minn. Stat. § 173.16, subd. 5(1). Minn. Rule 8810.1400 establishes the procedure and standards by which the Commissioner exercises that judgment. The Department’s assertion of dual jurisdiction over outdoor advertising devices is based upon the lack of certification by the City of St. Paul to be a “bona fide . . . local zoning authority” under Minn. Stat. § 173.16, subd. 5(1). There is no basis for giving precedence to Midwest in a state permit application because Midwest obtained a city permit. If the City of St. Paul had been certified under Minn. Rule 8810.1400, there would be no reason to get a state permit at all.

The pertinent St. Paul ordinance prohibits outdoor advertising devices within 1000 feet of each other. Midwest argues that its having obtained a city permit renders 3M incapable of getting a city permit without violating the ordinance. The Department maintains that whether or not a permit applicant can meet local ordinances is irrelevant to the issuance of a state permit. The standards for issuance of a state permit are set by statute and rule. The Department does not have the authority to impose additional requirements on permit applicants without adopting those requirements by rule. In the case of zoning ordinances, this lack of authority is particularly important since variances are often granted from particular restrictions. The Department must issue or deny permits by its own standards and leave other authorities to their proper jurisdiction.

Issuance of Permit to Midwest Outdoor

The Judge recommends that a permit be issued to Midwest Outdoor for the following reasons. First, Midwest Outdoor met all the requirements for issuance of the permit. This issue is not challenged in this proceeding. Second, according to the Department’s permit processing rules, “. . . all applications will be processed in order of receipt.” Minn. Rules, Subp. 1. Midwest Outdoor’s application was filed approximately 30 days before 3M’s application. Finally, Midwest Outdoor’s billboard would comply

with the separation requirements in that it would not be within 500 feet of another billboard.

A.E.G.